(5)

No. 95-1263

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

CATERPILLAR INC.,
*Petitioner,*

v.

JAMES DAVID LEWIS,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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June 14, 1996

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary because the Respondent has refused consent.

*Amicus*, Product Liability Advisory Council, Inc. ("PLAC"), is a nonprofit corporation with 115 corporate members * from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to auto-

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* A list of members is provided in the attached Appendix. Petitioner Caterpillar Inc. is a member of PLAC. The *amicus curiae* brief, however, is not submitted on behalf of Caterpillar, which is represented separately before this Court.

mobiles to pharmaceutical products. PLAC's purpose is to file *amicus* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

The effective exercise of the right to remove a case from state to federal court and its impact on federal practice and procedure is of vital concern to American industry. Although it is not an issue that is strictly limited to the area of products liability, it is quite common in those cases. As a significant voice on issues in this area, PLAC seeks to submit this *amicus curiae* brief in order to identify for the Court the broader concerns and implications involved in making a determination on the issue before it.

Accordingly, *amicus* seeks leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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## QUESTION PRESENTED

Whether, when complete diversity exists at the time of final judgment, the judgment may be set aside and the case remanded from federal to state court on the ground that there was a procedural defect in the removal of the case to federal court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES



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## BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF THE *AMICUS*

The interest of the amicus is set forth in the motion accompanying this brief.

### SUMMARY OF ARGUMENT

The right to remove a civil case from state to federal court is as old as the Republic itself. The first Congress provided this opportunity for defendants compelled to litigate beyond their home state. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (providing for removal when the amount in controversy exceeded $500 and the defendant was a citizen of a different state). The right of removal is a recognition that federal courts assure an

impartial forum in circumstances where original interests or identities might otherwise operate to prevent impartiality.

The value of that right is eroded, however, where valid federal judgments are subject to collateral attack on the basis of procedural requirements surrounding removal which lose their significance with the entry of judgment. At that stage, considerations of judicial efficiency simply outweigh the interests protected by strict adherence to the procedural rules governing how removal is accomplished. Protection of the value of the removal right and recognition of the interest of judicial efficiency suggest that the Court confirm a bright line rule that *no* violation of the removal statute is a proper ground for setting aside the judgment of a federal court where the court has jurisdiction at the time judgment is entered.

Such a bright line rule would not impermissibly expand federal jurisdiction. It would avoid giving significance to legal ritual that is without benefit to existing jurisprudence, the parties, or the judiciary.

At the very least, the Court should confirm such a bright line rule where the plaintiff has not sought interlocutory review of denial of a request for remand. The Court should deter the kind of gamesmanship that, for example, inheres in the decision of the respondent in this case to await a judgment in the district court before seeking appellate review of the propriety of the removal of the case to federal court. A litigant should not be permitted to await the outcome of his case and, losing, have the opportunity to try once again in another court on the basis of a procedural flaw that is without jurisdictional significance. The interest of judicial efficiency warrants a requirement of prompt request for interlocutory review of the remand decision.

Stating such a bright line principle, binding in this case, is entirely appropriate. The Sixth Circuit's decision here is contrary to the Court's holding in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951) and *Grubbs*



*v. General Electric Credit Corp.*, 405 U.S. 699 (1972). The Sixth Circuit improperly ignored the complete diversity that existed at final judgment in this case. Reversing the Sixth Circuit would only uphold established precedent of this Court. Stating a bright line rule at this time, binding in this case, merely invokes established precedent in this case and directs the federal judiciary in future cases so as to end collateral attacks on federal court judgments based on insignificant removal issues. By confirming and clarifying the principles of *Finn* and *Grubbs*, this Court can preserve the important practical strength of a federal judgment and promote fundamental fairness by removing the incentive a plaintiff has to hide away for years, as plaintiff has done here, issues that should be resolved at the outset of litigation.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN FINDING THAT THE DISTRICT COURT LACKED JURISDICTION OVER THIS CASE BECAUSE OF A FAILURE TO MEET REQUIREMENTS OF THE REMOVAL STATUTE AT THE TIME OF REMOVAL OF THE CASE TO FEDERAL COURT.

The Court has long protected the right to removal and cautioned in that context that " 'the Federal courts may, and should, take such actions as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.' " *Wecker v. National Enameling and Stamping Co.*, 204 U.S. 176, 182-83 (1907) (quoting *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906)).[1] The Court again emphasized the importance

[1] The Court has acted to safeguard this substantial right in numerous instances. For example, a plaintiff may not deprive a defendant of the right to proceed in federal court by amending a pleading to state damages that are below the jurisdictional amount. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292 & n.23 (1938). In addition, the plaintiff may not attempt to

of preserving the right to remove in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 101 (1898), in which the Court stated that the enforcement of an "incidental provision" should "yield to the principal enactment as to the right."

Several decisions of this Court make plain that in a removed case, whether removal is procedurally correct or not, the jurisdictional validity of a final judgment is determined on the basis of whether the district court possessed subject matter jurisdiction at the time the judgment issued. In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), this Court noted that it had long upheld district court judgments even when there was no right of removal. *Id.* at 16 n.14 (citing *Baggs v. Martin*, 179 U.S. 206 (1900)). The Court in *Finn* explained that this determination was made because "the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment." *Id.* at 16.

The Court addressed this question again in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). In *Grubbs*, the unanimous Court reversed the decision of the Fifth Circuit that the district court lacked jurisdiction because of imperfections in the removal of the case to federal court. The Court in *Grubbs* stated that "the requirement that jurisdiction exist at the time of judgment . . . is satisfied here." *Id.* at 705.[2]

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destroy diversity through improper joinder of nondiverse parties. *Wecker*, 204 U.S. at 182.

[2] This is not a rule limited to removed cases. Where a case is initially filed in federal court and lacks complete diversity at that point, a judgment entered at a later time when there is complete diversity is valid, the court having jurisdiction at the time of judgment. *See, e.g., Horn v. Lockhart*, 84 U.S. 570 (1873) (affirming the dismissal of a party prior to trial to preserve diversity jurisdiction); *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469 (6th Cir. 1952). Moreover, the Court has gone even further to recognize the authority to dismiss parties during the *appellate* stage of litigation after judgment to preserve jurisdiction "particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges and other litigants waiting for judicial attention. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989).



That requirement is satisfied in this case as well. The only parties that participated in the trial of this case in the district court and were subject to its final judgment were respondent James Lewis, a citizen of Kentucky, and petitioner Caterpillar Inc., a Delaware corporation with its principal place of business in Illinois. It is black letter law that, at the time of entry of judgment in this case, there was the complete diversity necessary to invoke federal subject matter jurisdiction. The Sixth Circuit found that the jurisdictional clothes of the case were too ragged when it first appeared at the doorstep of the federal court; even if that were the case, it had undoubtedly changed into proper attire by the time the district court exercised its power to render a final judgment. As the previous decisions of this Court make manifest, it is the jurisdictional dress of the case at judgment that is determinative.[3]

The Court should confirm this rule with a bright line statement of the principle implicit in those decisions: *No* violation of the removal statute warrants setting aside a judgment of a federal court rendered at a time when the court had subject matter jurisdiction. Failure to comply with the removal statute does not have jurisdictional significance.

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[3] If there had been no diversity at the time of judgment, the Sixth Circuit would arguably have been correct in setting aside the judgment for lack of subject matter jurisdiction.

## II. ONCE JUDGMENT HAS BEEN ENTERED IN A REMOVED CASE AND A PLAINTIFF HAS FAILED TO SEEK INTERLOCUTORY REVIEW OF A DENIAL OF A REMAND PRIOR TO THAT OUTCOME, ANY FAILURE TO MEET THE REQUIREMENTS OF THE REMOVAL STATUTE IS NOT A SUFFICIENT BASIS TO ATTACK SUCH JUDGMENT.

Congress has already invoked the practical principle that removal issues be resolved at the outset of a case. In 1988, it amended the removal provisions to provide that a motion to remand based on "any defect in removal procedure" must be made within thirty days after filing the notice of removal. 28 U.S.C. § 1447(c), *as amended by* Pub. L. No. 100-702, tit. X, § 1016(c)(1), 102 Stat. 4642, 4670 (1988). In elaborating on this Court's decisions in *Grubbs* and *Finn*, the Ninth Circuit and Fourth Circuit have similarly recognized this goal, a goal which has the dual benefits of promoting judicial economy and fairness. The decisions of the Ninth Circuit and the Fourth Circuit require the plaintiff to seek an interlocutory appeal of a denial of a remand. This forces an early determination of the issue so that it will be settled long before a case proceeds to final judgment in the district court.

Such a requirement works no injustice but merely prevents a plaintiff from electing to ignore the issue and later sandbagging a successful defendant on appeal.

The Ninth Circuit first considered this procedure in *Sheeran v. General Electric Co.*, 593 F.2d 93 (9th Cir.), *cert. denied*, 444 U.S. 868 (1979). Following removal, a motion to remand was denied. The plaintiff failed to seek an interlocutory appeal of the denial of remand. The court looked to *Grubbs* and concluded that, regardless of imperfections in the removal process, because jurisdiction existed at the time of judgment, the judgment should be upheld. *Id.* at 97-98. The court ruled that



"appellants are precluded at this late date from raising the removal issue." *Id.* at 98.

The Ninth Circuit elaborated on this analysis in *Gould v. Mutual Life Ins. C. of New York*, 790 F.2d 769 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986). In applying *Finn* and *Grubbs*, the court reached the same result as in *Sheeran*, noting that in failing to pursue an interlocutory review the plaintiff should bear the risk that subject matter jurisdiction will exist at final judgment. *Id.* at 774. The court pointed out that the procedure puts the plaintiff to a choice as to what forum the plaintiff wishes to proceed in while at the same time promoting finality and judicial efficiency. *Id.*

The Fourth Circuit adopted this rule in *Able v. Upjohn Co., Inc.*, 829 F.2d 1330 (4th Cir. 1987), *cert. denied*, 485 U.S. 963 (1988). The court examined the holdings in *Finn, Grubbs, Sheeran* and *Gould* and found that the cases required the plaintiff to seek an interlocutory appeal of the denial of the remand motion: "Interests of finality and judicial economy also strongly suggest that the district court's judgment should not be disturbed where a party fails to avail himself of a remedy that might have earlier resolved the removal question. At this late stage in the proceedings, the judgment should stand." *Id.* at 1333. The court concluded that "[w]here a matter has proceeded to judgment on the merits and principles of federal jurisdiction and fairness to parties remain uncompromised, to disturb the judgment on the basis of a defect in the initial removal would be a waste of judicial resources." *Id.* at 1334. The Second Circuit has also indicated that it is persuaded by the reasoning of the Ninth and Fourth Circuits on this issue. *See Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13, 16 n.3 (2d Cir. 1995) (acknowledging *Gould* and *Able* as building on *Finn* and *Grubbs*).

Moreover, it is clear that this procedure does not run the risk of expanding federal jurisdiction. As the *Finn*

Court earlier noted, recognizing the validity of such judgments "did not endow [the federal court] with a jurisdiction it could not possess." *Finn*, 341 U.S. at 17; *see also Able*, 829 F.2d at 1333 (citing *Finn* on this point).

In this case, because Lewis did not seek an interlocutory appeal of the denial of the remand, he did not avail himself of the appropriate means to resolve any doubt concerning the removal to the federal court. Because there is no expansion of federal jurisdiction and fairness to the parties is not otherwise compromised, the judgment of the district court should stand.

## CONCLUSION

The judgment of the court of appeals should be reversed with instruction to reinstate the judgment of the district court.

Respectfully submitted,

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## APPENDIX

3M
ACRISON, Inc.
AlliedSignal, Inc.
Aluminum Co. of America
American Automobile Manufacturers Assn.
American Brands, Inc.
American Home Products Corp.
American Suzuki Motor Corp.
Andersen Corporation
Anheuser-Busch Companies
AT&T/Lucent Technologies Inc.
Atlantic Richfield Co.
Baxter International Inc.
Becton-Dickinson & Company
Beech Aircraft Corporation
BIC Corporation
Black & Decker Corp.
BMW of North America, Inc.
Boeing Company, The
Bridgestone/Firestone, Inc.
Briggs & Stratton
Bristol-Myers Squibb Co.
Brown-Forman Corporation
Budd Co., The
Burroughs Wellcome Co.
C.R. Bard, Inc.
Case Corporation
Caterpillar, Inc.
CBI Industries, Inc.
Chrysler Corporation
Ciba-Geigy Corp.
Clark Material Handling Company
Coca-Cola Co.
Coleman Co., Inc., The
Continental General Tire, Inc.
Corning Incorporated
Dana Corporation
Deere & Company
Dow Chemical Company, The
Eaton Corporation
Eli Lilly and Co.
Emerson Electric Co.
Estee Lauder Cos.
Exxon Corp.
Federal-Mogul Corp.
FMC Corporation
Ford Motor Co.
Freightliner Corporation
Gates Rubber Co., The
General Electric Co.
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Guidant Corporation
Harrischfeger Industries
Hoechst Celanese Chemical Group, Inc.
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Jervis B. Webb Company
Johnson Controls, Inc.
Kaiser Aluminum & Chemical Corporation
Kawasaki Motors Corporation, USA
Kia Motors America, Inc.
Kraft Foods, Inc.

Lorillard Tobacco Company
Mack Trucks, Inc.
Mazda (North America), Inc.
Melroe Co.
Mercedes-Benz of N. America, Inc.
Michelin North America, Inc.
Miller Brewing Co.
Mitsubishi Motor Sales of America, Inc.
Monsanto Co.
Navistar International Transportation Corp.
New United Motors Manufacturing, Inc.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
Owens-Corning Fiberglas Corporation
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Pharmacia and Upjohn, Inc.
Phillip Morris Companies, Inc.
Playtex Products, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co.
Raymond Corp., The
RJ Reynolds Tobacco Co.
Rockwell International Corporation
Rover Group, Ltd.
Schindler Elevator Corp.
Sears, Roebuck & Co.
Sherwood, a Division of Harsco Corp.
Simon Access-North America
Snap-on Incorporated
Sofamor Danek Group, Inc.
State Industries, Inc.
Sturm, Ruger and Co., Inc.
Subaru of America
Thomas Built Buses, Inc.
Toro Company, The
Toyota Motor Sales, USA, Inc.
TRW, Inc.
U.S. Tobacco
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Co.
Whirlpool Corp.
White Consolidated Industries, Inc.
Yamaha Motor Corp. USA